Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

80-648

No. ——

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

EUROPEAN TRADE SPECIALISTS, INC. and
KUNZLE & TASIN,
Petitioners

v.

UNITED STATES OF AMERICA, and
THE FEDERAL MARITIME COMMISSION,
Respondents

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT

WILLIAM L. BORDEN
1527 18th Street, N.W.
Washington, D.C. 20036
(202)-223-3455

Attorney of Record
for Petitioners

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QUESTIONS PRESENTED

Where the misconduct of an ocean carrier and of a forwarder is alleged to be extreme, entitling a shipper to consequential and punitive damages at common law: --

(a) Is the administrative remedy available to the shipper through the Federal Maritime Commission and the Shipping Act, 1916 an exclusive remedy?

(b) Does the Shipping Act pare down and revise common law concepts of wrong and of liability such that the shipper cannot now obtain relief through the Federal Maritime Commission at all commensurate with the relief which, on the same alleged facts, he might have obtained in a court prior to the year 1916?

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REFERENCE TO PROCEEDINGS BELOW

The June 3, 1980 Judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered without opinion, as was that Court's July 22, 1980 Denial of the Petition for Rehearing. Neither is offically reported.

The Federal Maritime Commission orders are as follows:

(a) May 28, 1976 Report and Order on Remand; and

(b) March 20, 1979 Report and Order.

The earlier order is reported at 19 F.M.C. 1148 (1976). The later order is not officially reported at this time.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 3, 1980, and the Denial of the Petition for Rehearing was entered on July 22, 1980.

Jurisdiction is conferred upon the Supreme Court by 28 U.S.C. 1254 (1), which authorizes review of the judgments of the Courts of Appeal by writ of certiorari.

STATUTORY REFERENCES

Shipping Act, 1916 (46 U.S.C. 901 et seq.)

Sections 16, 17, 18(b)(3), 22, and 23

Regulations Issued under Shipping Act:

46 C.F.R. 510.24 (c), (e), and (j)

See Appendix for text of statutes and of regulations.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari involves a maritime quadrangle, to wit: A shipper (European Trade Specialists, Inc., based near Cleveland, Ohio); a consignee (Kunzle & Tasin, a partnership based in Milan, Italy); a common carrier by water subject to the Shipping Act (Prudential-Grace Lines, Inc., with headquarters in New York City); and a forwarder licensed under the Shipping Act (The Hipage Company, Inc., with an office in Norfolk, Virginia).

In February, 1974 the shipper and the consignee filed a complaint with the Federal Maritime Commission ("the Commission") pursuant to Section 22 of the Shipping Act, charging the carrier and the forwarder with violations of Sections 16, 17, and 18(b)(3) of that Act in connection with a shipment of goods from Norfolk, Virginia to Genoa, Italy. Reparation for lost profits and punitive reparation were

sought. Complainants contended, inter alia:

(a) That the shipment was of importance to them as the first shipment exploiting prior sales development effort and opening up a new market for their product in southern Europe;

(b) That their dominant competitor in this product line and in this market had previously obtained a low commodity tariff rate for ocean carriage of the commodity, and they were eligible for the benefit of the same rate;

(c) That the carrier offered to transport their product at the low commodity rate and, in reliance upon such offer and upon the carrier's assurances, they accepted the offer thereby creating a valid and binding contract between themselves and the carrier;

(d) That they advised the forwarder to describe the product as qualifying for the low commodity rate on the bill of lading, and the forwarder received and understood this advice and initially acted to carry it out;

(e) That the carrier objected to the low rate, whereupon the forwarder at the urging of the carrier changed the description on the bill of lading such that the carrier rated the goods as Cargo, N.O.S. (Not Otherwise Specified);

(f) That the carrier charged and collected an amount for freight which was 13 times greater than the amount which ought to have been assessed, and the carrier paid the forwarder as commission an amount which was 13 times greater than the commission which the forwarder ought to have been paid;

(g) That the forwarder (in violation of the Shipping Act and of regulations issued under such Act) never informed the shipper concerning the carrier's objections to the low commodity rate, and the shipper only learned of the high rate actually charged from the consignee after the consignee paid it some eight weeks later;

(h) That junior personnel of the carrier then promised a refund of the difference between

the high rate and the low rate, and they issued a Notice of Correction to the bill of lading changing the freight charge from the one rate to the other;

(i) That top management of the carrier, in bad faith and with actual knowledge of business injury to the shipper and to the consignee, caused a second Notice of Correction to be issued reverting the freight charge back to the high rate;

(j) That no refund was ever made; and

(k) That no further shipment of the commodity in question was ever made to the market in questio the shipper and the consignee deeming their effort to compete in such market to be economically impractical by reason of the high freight charge on the first shipment.

The carrier did not address complainants' contentions that its top management had acted in bad faith, with foreknowledge of consequences. It contended, inter alia, that the high freight

charge was correct and expressly mandated by Section 18(b)(3) of the Shipping Act, and that complainants failed to show that the carrier had ever transported a like cargo over the same ocean route under like circumstances at a different and lower rate (the "competitive relationship" doctrine).

The forwarder contended, inter alia, that it did timely and properly communicate with the shipper and that complainants failed to show that it had ever forwarded a like cargo over the same ocean route under like circumstances but with different treatment of its shipper principals.

The forwarder further contended that, even if it omitted timely and proper communication with the shipper in this instance, the omission was only a single instance and a pattern of such omissions would be required to constitute violation of the Shipping Act and/or regulations issued under that Act.

On May 28, 1976 the Commission upheld

one of its administrative law judges in dismissing Section 16 and Section 17 charges against the carrier and all but one Section 17 charge against the forwarder, on grounds that complainants had failed to meet applicable requirements of the "competitive relationship" doctrine.

The Commission did not address the evidence of bad faith and of foreknowledge of business injury to complainants which they had introduced at hearings in connection with the conduct of carrier top management and which, they argued, denotes Shipping Act violation. The Commission, however, did state:

> " .. we have not ignored [complainants'] underlying theories of common law wrong, but, rather, have attempted to pare them down to activities at least colorably justiciable under the mandates of sections 16, 17 and 18 of the Shipping Act, 1916." (Appendix p. xxxii)

In its May 28, 1976 ruling the Commission remanded to the administrative law judge for rehearing of one Section 17 issue (whether the forwarder timely and properly communicated with

the shipper) and the Section 18(b)(3) issue (whether the cargo was correctly classified and rated for purposes of the freight charge).

On March 20, 1979 the Commission overruled its administrative law judge, holding that the low commodity rate was the correct freight charge. The Commission said:

> "Because the bill of lading description and the good faith of the carrier are irrelevant to this finding of misclassification, we find that Respondent Prudential [the carrier] violated section 18(b)(3). [Citation omitted.] Complainant having paid freight charges in the amount of $2,532.45 and the proper charges being $206.25, we find that Complainant is entitled to reparations in the amount of $2,532.45 from Respondent Prudential, plus interest, at the rate of 6 percent per annum in the amount of $1,038.30." (App. p. xvi, footnote omitted.)

In the same March 20, 1979 ruling, which discontinued the proceeding, the Commission upheld its judge on the Section 17 issue, stating:

> Even assuming, without deciding, that European [the shipper] was not notified of the classification and rating problem we cannot say that such conduct by Hipage [the forwarder] amounts to violation

> of section 17. Unless its normal practice was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. [Citation omitted.] We therefore, need not reach the issue of whether in this case the shipper was so notified." (App. p. xvii; emphasis in original.)

The Commission did not comment on the question of whether "adverse treatment" by the forwarder, if it existed in this case, might sustain a cause of action by the shipper in some other forum.

In its last ruling of March 20, 1979, as in its earlier ruling of May 28, 1976, the Commission did not address the evidence of carrier bad faith and foreknowledge of business injury to complainants.

Their claims that the forwarder had acted as agent-in-fact for the carrier and for itself, and not for its shipper principal, were rejected in the earlier ruling as not fulfilling the "competitive relationship" doctrine. These claims were not mentioned in the later ruling.

Complainants did not at any time during

the proceedings before the Commission introduce evidence as to the actual money extent of the business injury (lost sales development expenses and lost profits) which they experienced; and that say that, pursuant to Commission practice and a ruling of the administrative law judge, they were not at any time permitted to introduce such evidence.

In defining the amount of reparation granted to complainants from the carrier, the Commission did not comment on whether or not evidence of the extent of complainants' business injury would be relevant in the circumstances.

On appeal by the shipper and consignee to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. 2342-3, the judgment of that Court affirmed the Commission without opinion on June 3, 1980; and the petition of the shipper and consignee for rehearing by the Court was denied without opinion on July 22, 1980.

Their instant petition now follows.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. All roads to relief for this shipper and this consignee led through the Federal Maritime Commission, and the administrative remedy there available appears to be the exclusive remedy in the present state of the statutory and case law.

2. The extent to which, if at all, the Shipping Act re-defines and limits common law concepts of wrong and of liability presents important questions of law warranting consideration in this Court

3. This case furnishes reason to believe that the U.S. Court of Appeals for the District of Columbia Circuit and the Federal Maritime Commission misapprehend in a rather fundamental way the meaning of the reparation provisions of the Shipping Act and the guidance previously furnished by this Court as to such meaning.

4. Aggrieved parties in the maritime community, as illustrated by this case, are without any forum in which they may obtain adequate relief; and exercise of the supervisory powers of this Court is needed.

Discussion

1. The exclusivity of the administrative remedy

If these petitioners had sued the carrier and the forwarder in a court, the suit would likely have been dismissed for failure to exhaust the administrative remedy. See, e.g., Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 940 (1956).

Alternatively, the suit might have been stayed and the issues referred to the Federal Maritime Commission for resolution as required by the doctrine of primary jurisdiction (this case in all its aspects being one which patently falls within the Commission's sphere of expertise). After the Commission had spoken, the referring

court would have dismissed the suit for want of jurisdiction to review the Commission's decision. Pursuant to 28 U.S.C. 2342 a decision of the Commission may only be questioned in a U.S. Court of Appeals. This is precisely the sequence of procedural steps affirmed in Port of Boston Marine Terminal Ass'n v. Rederi. Transatlantic, 400 U.S. 62 (1970).

Petitioners had effective access to no forum other than the Commission's forum. Thus the view of the Commission and of the Court of Appeals on the extent of the relief available in that forum assumes unique importance to petitioners and to all maritime parties in the position of petitioners.

2. The Shipping Act and the common law

The language of Sections 16 and 17 of the Act confers a mandate on the Commission as sweeping and "constitutional" in scope as the mind of man is capable of devising. This language is full of expansive words such as "undue", "unjust",

"just", and "reasonable". Nothing in the legislative history of the Act hints that the Congress intended it to re-define and limit common law concepts of wrong and of liability.

The wilfull, aggravated misconduct of the carrier and the forwarder in this case, if the evidence of it persuades, plainly is unjust and plainly falls within Shipping Act concepts of wrong and of liability no less than within common law concepts.

The Commission erred in declining to address the evidence of carrier bad faith. It cites no authority for declining. It merely states, in conclusory fashion, that its jurisdiction under the Act requires it to "pare down" the contentions of the shipper and consignee in this respect.

That the Commission was nevertheless troubled by the evidence of carrier bad faith is apparent in several oblique references to it, short of confronting it and ruling on whether or not it persuades. Complainants and all others in their

position were and are entitled to such a ruling.

The classic dereliction of which a forwarder, an agent by Shipping Act definition, can be capable is representation of a third party (the carrier) and of itself at the expense of its true shipper principal. The Commission erred in rejecting this contention of complainants on grounds that a "competitive relationship" had not been shown.

The "competitive relationship" doctrine is pernicious because a shipper, such as the shipper in this case, cannot summon into existence another shipper of a like cargo over the same ocean route under like circumstances. Thus the doctrine may purport to sanction outrageous misconduct on the part of a carrier or forwarder, absent a second shipper twin of the first shipper. (Actually, the doctrine is founded upon a misreading of the "or" in Section 16 First as though it were an "and".)

This Court has recognized the weakness, if not the perniciousness, of the "competitive

relationship" doctrine and all but abolished it in Volkswagenwerk v. FMC, 390 U.S. 261, 280 (1968).

A ruling on the "competitive relatinship" doctrine is not essential to just disposition of this case on appeal, if the petition of the shipper and consignee for a writ were to be granted; for the Commission itself recognized (inconsistently) in its May 28, 1976 ruling that Section 17 may have been violated by the forwarder even though no "competitive relationship" had been shown. And the Commission's ruling that the carrier violated Section 18(b)(3) suffices in itself for just resolution on appeal vis-a-vis the carrier (see infra).

But this case does furnish this Court with an opportunity further to examine the "competitive relationship" doctrine, should the Court deem it fitting to do so in the interests of the maritime community.

In any event, the present case affords the Court opportunity to make clear to the Courts

of Appeal and to the Commission that the Shipping Act does not re-define or limit common law concepts of wrong and of liability -- or if it does, the manner and extent of re-definition and limitation.

3. Misreading of the Act and of this Court's guidance as to the meaning of the Act

Section 17 states that a licensed forwarder subject to the Act, such as the forwarder herein, shall "establish, observe, and enforce just and reasonable ... practices .... " (emphasis supplied). This forwarder did not observe and enforce such practices if it failed promptly to notify and confer with the shipper concerning the objections of the carrier to the low tariff rate, while rewarding itself with a carrier-paid commission 13 times greater in amount than ought to have been paid.

Thus, by the express terms of its own chief enabling statute, the Commission was required to reach the question of whether the forwarder did or did not promptly and properly communicate

with the shipper. In perceiving no need to reach this question, on grounds that only a pattern of forwarder withholding of information from the shipper violates the Act, the Commission dramatized the plight of aggrieved maritime parties in the one and only forum which appears to be available to them.

The same may be said of certain Commission regulations, i.e., 46 C.F.R. 510.23(c), (e), and (j) (formerly known as Commission General Order No. 4). In the most detailed and express manner, as though written with prevision of the alleged facts of this case, these regulations order a forwarder to do that which the shipper and consignee say the forwarder did not do. The Commission again perceived no need to reach the question of whether its regulations were disobeyed, on the same grounds that only a pattern or series of disobediences would constitute violation of the Act under which the regulations were issued.

Section 23 of the Act states that reparation

orders of the Commission "shall be made only after full hearing" (emphasis supplied). In this case there was not a full hearing because complainants did not introduce evidence, and they say they were not permitted to introduce evidence, as to the actual money extent of the business injury which they experienced.

With regard to the meaning of Section 22, this Court furnished guidance in Consolo v. FMC, 383 U.S. 607, 622 (1966) as follows:

> "[Section 22] contemplates that the Commission shall have a certain amount of discretion, but it does not specify what factors are to be considered by the Commission in exercising this discretion. However, we assume that the Commission could validly consider such factors as whether a reparations award would enhance enforcement of the Act, whether the shipper has suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of the culpability of the carrier."

In the case of these petitioners the amount of the reparation awarded enhances disobedience of the Act; for this amount doubtless commands less purchasing power in 1979 dollars than the

same amount in 1972 dollars which the carrier had collected as the freight money, after due adjustment for inflation and the value of 1972 dollars in terms of commercial and compouded interest rates.

That this shipper and this consignee suffered compensable injury is affirmed in Consolo, supra at 624, wherein the Court recognized the importance and "sting of losing expected profits" and added:

> "Such a loss is real and it is certainly compensable under the Shipping Act."

Likewise, since an award of reparation for lost profits was approved in Consolo and in cases there cited, a like award in the instant case of the shipper and consignee would be consistent with the previous application of the Act.

The last factor which this Court assumed in Consolo that the Commission could validly consider is "the factor of the culpability of the carrier". This appears clearly to mean that, where the misconduct of the carrier (and, one infers, the misconduct of the forwarder as another party

subject to the Act) is wilfull and aggravated, the Commission is obliged to consider evidence of wilfullness and aggravation and, if persuaded that these are shown, to award punitive reparation.

In the instant case the Commission exercised more than "a certain amount of discretion", contrary to the guidance of this Court in Consolo, in declining to address wilfullness and aggravation evidence, in ruling without any evidence of the actual extent of business injury, in letting the forwarder go free, and in limiting reparation from the carrier to the difference between the correct and incorrect freight rates.

Further, except for the concurring opinion of one Comissioner in the May 28, 1976 ruling, the Commission and the Court of Appeals showed scant regard for the view of this Court in Volkswagonwerk, supra, that the dictates of the "competitive relationship" doctrine deserve very little weight.

4. The need of maritime parties for assistance

By and large, throughout the economic and commercial life of our society, one who behaves in bad faith or in reckless disregard of the rights of others, with reason to know the consequences or probable consequences, is subject to liability for consequential and punitive damages.

The interpretation which the Court of Appeals and the Commission give to the reparation provisions of the Shipping Act carve out an exception to this general rule. Aggrieved maritime parties, like the shipper and consignee here, appear restricted to one forum; and even if they prove their cause in that forum, they still cannot obtain the relief which in other sectors of economic and commercial life would be forthcoming from the courts and/or administrative agencies.

The Shipping Act, 1916 has been on the statute books for some 64 years. It is time that the meaning of this Act be clarified, and allowance of the writ in this case provides an excellent vehicle to this Court for so doing.

Respectfully submitted,

William L. Borden

William L. Borden

1527 18th Street, N.W.
Washington, D.C. 20036
Telephone: (202)-223-3455

Attorney of Record
for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that today, this 20th day of October, 1980, I have mailed three copies of the foregoing Petition and of the separately presented Appendix by United States mail, first class postage prepaid, to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brien E. Kehoe, Esquire
General Counsel
Federal Maritime Commission
Washington, D.C. 20573

John B. King, Jr., Esquire
2050 Virginia National Bank Bldg.
One Commercial Place
Norfolk, Virginia 23510

William L. Borden

William L. Borden